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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, *et al.*, *Petitioners*,

v.

ALBERTA SCHERMERHORN, *et al.*, *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR PETITIONERS ON REARGUMENT

THE ISSUE TO BE REARGUED

In its decision of June 3, 1963, the Court restored this case to its calendar for reargument on the following issue, 373 U.S. 746, at 747-748:

> (W)hether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the State's prohibition against such [agency shop] arrangements.

In response to this question, there are three main alternatives for remedying a union security contract in violation of a valid state law enacted under § 14(b)[1] of the federal

[1] Section 14(b). Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Labor Act, 29 U.S.C. § 164(b): exclusive federal remedies, exclusive state remedies, and dual remedies based on concurrent regulation by both federal and state authorities. Section § 14(b) does not explicitly confer any remedial power on the States. If the States have remedial power, therefore, it must emanate from some source other than the language of § 14(b) itself.

Because petitioners believe that execution of such a contract constitutes a federal unfair labor practice, they urge that the National Labor Relations Board's remedial power be declared exclusive in order to avoid intolerable consequences for the administration of the nation's principal labor relations statute. This view is supported by the overall design of the Labor Act, by its legislative history, by considerations of national labor policy, and by leading decisions of this Court.

SUMMARY OF ARGUMENT.

1. Execution of a compulsory union membership contract in violation of a state statute prohibiting such a contract constitutes a federal unfair labor practice. Compulsory membership contracts may be lawfully executed as a matter of federal law only when "authorized" by § 8(a)(3)'s first proviso. However, § 14(b) removes the authorization of that proviso when state law prohibits such a contract, which means that federal law prohibits such contracts when they are prohibited by state policy. It is quite common for federal law to allow the States to declare a policy which may be enforced solely by federal authorities. The federal Assimilative Crimes Act of 1948, 18 U.S.C. § 13, 54 Stat. 234, is a familiar example. Many other examples of federal absorption of state policy are cited in *United States* v. *Sharpnack*, 355 U.S. 286, 294-296.

2. Federal remedies should be applied exclusively, for the remedies provided by the States' "right-to-work" laws

are incongruous with the remedial scheme of the federal Act. For example, eleven of the present "right-to-work" statutes make violations criminal offenses, subjecting violators to imprisonment and fines, as well as to lawsuits for actual and punitive damages. The federal Act's remedy, however, is a cease-and-desist order. Section 10(c), 29 U.S.C. § 160(c).

3. Concurrent state remedies would inevitably constitute an interference with the administration of the federal Act by the N.L.R.B., for the States could (as they have) come to opposite conclusions of fact from those reached by the Board. Not only will the Board and state courts come to different results as a matter of fact, but also, because state court power depends upon findings of fact, there will be conflicts of fact over the existence of state court regulatory jurisdiction. Such conflicts would be oppressive on commerce and an impediment to the objectives of the national labor policy. Moreover, permitting the States to remedy alleged violations of their "right-to-work" laws will constitute an invitation and a temptation to the state courts to regulate all related aspects of labor relations.

4. The legislative history of § 14(b) contains no evidence that Congress intended to permit the States to fashion and apply their own remedies for conduct which constitutes a federal unfair labor practice, as well as a violation of their "right-to-work" laws. While Congress did not focus on this question, the absence of *any* discussion of the problems inherent in a scheme of concurrent jurisdiction reveals that Congress did not intend to unleash the severe consequences which would follow such concurrent jurisdiction. Moreover, Congress' adoption of the language of § 14(b), and its rejection of the language of § 13 of H.R. 3020, strongly points to an intention to make federal remedies exclusive.

5. *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, is no barrier to holding

federal remedies exclusive here. *Algoma*, decided principally under the Wagner Act, did not even deal with the two major questions here, *i.e.*, whether violation of a "right-to-work" law constitutes a federal unfair labor practice and, if so, whether the federal remedy should be exclusive. The issue in *Algoma* was whether the Wagner Act prevented both a prohibiting state policy and a state remedy.

6. The preemption doctrine is fully applicable here, for state court remedies, which inherently interfere with the policies and procedures of the federal Board, have consistently been declared preempted even when asserted for violation of "right-to-work" laws, *Electrical Workers, Local 429* v. *Farnsworth & Chambers*, 353 U.S. 969; *DeVries* v. *Baumgartner's Elec. Construction Co.*, 359 U.S. 498; *Local 438, Construction & General Laborers* v. *Curry*, 371 U.S. 542.

ARGUMENT

I. Execution Of A Compulsory Membership Contract in Violation Of A Valid State Law Constitutes A Federal Unfair Labor Practice.

Does federal law prohibit the execution or application of contracts in violation of state statutes (known as "right-to-work" laws) which prohibit compulsory membership agreements? The intimate interrelationship between §§ 7, 8(a)(3) and 14(b) of the Labor Act can leave no doubt that execution of such contracts constitutes a federal unfair labor practice.

Section 7,[2] 29 U.S.C. § 157, guarantees employees "the right . . . to form, join, or assist labor organizations . . .

[2] Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining

and . . . to refrain from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as *authorized* in section 8(a)(3)."[3] Therefore, except where a union membership contract is expressly "*authorized*" by §8(a)(3), §7 guarantees the right of employees "*to refrain from*" joining

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or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[3] Sec. 8(a)(3). It shall be an unfair labor practice for an employer . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with any labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

or assisting a labor organization. Does § 8(a)(3) "authorize" the execution or application of a union membership contract in a "right-to-work" state? Plainly not.

Section 8(a)(3) implements § 7 rights by prohibiting "discrimination . . . to encourage . . . membership in any labor organization," with the single exception of when an agreement is made requiring union membership in accordance with the first proviso to § 8(a)(3). However, § 14(b) provides that "nothing in this Act shall be construed as authorizing" a contract requiring union membership in violation of state law. Because § 14(b) makes it perfectly clear that § 8(a)(3)'s first proviso cannot "authorize" a compulsory union membership contract in a "right-to-work" state, such a contract *ipso facto* constitutes illegal discrimination "to encourage . . . membership" under § 8(a)(3) in violation of employees' § 7 rights. In contemplation of law, § 14(b) operates as an additional proviso to § 8(a)(3).

This analysis was suggested by the Court's initial decision in this case, 373 U.S. at 756:

> Without the proviso to § 8(a)(3) and a similar savings clause in § 7, conditioning employment upon union membership would be an obvious unfair labor practice, under §§ 8(a)(1), 8(a)(3), and 8(b)(2), as Congress recognized in adding the proviso to § 8(3). With the proviso, however, such arrangements, if they comply with the terms of the proviso, are not unfair practices. Section 14(b), with obvious reference to § 8(a)(3), declares that "nothing in this Act" is to authorize "the execution or operation" [sic] of membership agreements in States in which such execution or operation is prohibited by state law.

The Board's cases, too, suggest that § 14(b) operates as an additional proviso to § 8(a)(3). In illustrative cases such as *Giant Food Shopping Center*, 77 N.L.R.B. 791, and *Northland Greyhound Lines*, 80 N.L.R.B. 288, the Board

long ago held that, under former § 9(e)(1), it had no statutory power to conduct a union shop authorization election in a state which prohibited the union shop, for § 14(b) does not authorize a union shop contract in such a state. Dissenting in *Giant Food Shopping Center, supra*, former Chairman Herzog observed that the Board was holding that violation of a state's "right-to-work" law was a federal unfair labor practice, 77 N.L.R.B. at 797-798:

> By declining to conduct even a consent election in a prohibiting State, the Board is declaring that a State offense becomes, *ipso facto*, a Federal offense. Any employer who discharges an employee within a prohibitive State pursuant to a union-shop agreement, and any labor organization that contributes to that result, not only violates the State enactment but also violates Section 8(a)(3) and 8(b)(2) of the Labor Management Relations Act. . . .

In his dissent in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, 325, Justice Black similarly pointed out that the Board "has construed the new federal Act as precluding such [compulsory union membership] contracts to the same extent that they are precluded by state law." This was not a point of contention with the majority.

There is nothing unusual about this absorption of state substantive law into the scheme of a comprehensive federal regulation. On the contrary, rational administration of the federal Act requires that state policies on the question of union security be absorbed into federal law and administered by the federal agency to avoid the burden on commerce and the interference with national policy which would result from the separate fact-finding and remedial process of the 50 states.

Section 14(b) plainly permits the States to declare a policy on the subject of compulsory union membership, but

state policy then becomes a point of reference for administration of the federal law. If a state prohibits compulsory union membership agreements altogether, § 8(a)(3) of the federal law prohibits all such agreements. On the other hand, a state might decide not to prohibit, but to permit, union membership agreements. That state policy, too, is absorbed into federal law, and therein § 8(a)(3) will thoroughly regulate the kind of compulsory membership agreement which might be executed. In both cases it is the state —not the federal government—which declares the applicable policy, but in both cases, the applicable state policy becomes federal policy and becomes subject to a federal remedy.

"Examples of the uses made by the Congress of . . . state legislative action in connection with the exercise of federal legislative power are numerous." *United States* v. *Sharpnack*, 355 U.S. 286, 294. The outstanding example, of course, is the Assimilative Crimes Act of 1948, 18 U.S.C. § 13, 54 Stat. 234, which absorbs state criminal laws on federal enclaves and vessels and airplanes in certain circumstances. Many other examples are set forth in *Sharpnack*, *supra*, 355 U.S. at 294-296, involving both criminal and civil statutes of the United States.

Labor relations in interstate commerce are legally like a federal enclave in that they are subject to federal regulation exclusively. As under the Assimilative Crimes Act, therefore, state statutes prohibiting compulsory union membership become absorbed by § 14(b) into §§ 8(a)(3) and 8(b)(2), to be enforced exclusively by the N.L.R.B.

There are no significant problems of interpreting state law, for the States will continue to interpret their own laws in cases involving *intrastate* commerce or through advisory opinions. Moreover, as a practical matter, the authority given to the States under § 14(b) is limited, and there is very little for the state courts to interpret. The N.L.R.B.

has been looking to the meaning of state statutes under § 14(b) for years in administering other provisions of the Act. *Fort Industry Co.*, 77 N.L.R.B. 1287; *Giant Food Shopping Center, Inc.*, 77 N.L.R.B. 791; *Northland Greyhound Lines*, 80 N.L.R.B. 288; *Safeway Stores, Inc.*, 81 N.L.R.B. 387. See also *Labor Board* v. *General Motors Corp.*, 373 U.S. 734, where the Court affirmed the Board's finding that an employer refused to bargain in good faith concerning an "agency shop" contract in Indiana, based on the Board's determination that the Indiana courts had approved "agency shop" agreements under that state's "right-to-work" law.

For these reasons execution of a compulsory union membership agreement in violation of a valid state law enacted pursuant to § 14(b) constitutes a federal unfair labor practice. Section 14(b) uses state statutes on this subject as a reference point and integrates state policy into the administration of § 8(a)(3). As the Court said in its initial decision herein, the "connection between the § 8(a)(3) proviso and § 14(b) is clear." 373 U.S. at 757. Violation of § 8(a)(3) by execution of a contract or any other conduct in violation of a valid, applicable state statute is subject to a federal remedy under § 10(c), 29 U.S.C. § 160(c), and the federal remedy, we shall now show, should be exclusive.

II. A Uniform and Exclusive Federal Remedy Is Consistent With the Scheme Of Congressional Regulation, Whereas Divergent State Remedies Would Interfere With Administration Of the Federal Act and With National Labor Policy.

Nothing in the federal Act is so thoroughly regulated as are arrangements for so-called "union security." Sections 7, 8(a)(3), 8(b)(2), 14(b), 302 and other provisions of the Act regulate in fine detail the manner in which union security contracts may be negotiated and administered. State

power to declare a broad prohibition against compulsory membership agreements is only one aspect of this thoroughly regulated subject. It is unlikely that Congress would turn over to the States full remedial power in connection with this aspect of the federal regulation of union security arrangements, while providing for federal remedies in all other aspects. Moreover, as will be discussed hereafter, there is no evidence in the legislative history of § 14(b) that Congress intended to unleash state remedies in this sensitive area.

To demonstrate the impact of such state remedies on commerce, if the States are authorized to assert jurisdiction over this subject matter, the following chart briefly summarizes the civil remedies and criminal penalties provided on the face of the present "right-to-work" laws. While some of these statutes or constitutional provisions do not expressly provide for either civil or criminal remedies, such remedies have actually been fashioned in litigation. For example, violation of such a statute is normally regarded as tortious conduct which may be remedied both equitably and in damages. It is also important to remember in considering existing penalties and remedies that the States are perfectly free to increase these penalties as they choose, and it is not unthinkable that some of these States might make violations felonious.

STATE	STATUTE	PENALTIES	CIVIL REMEDIES
1. Alabama	Ala. Code Ann. Tit. 26 § 375 (1958)	None.	Damages.
2. Arizona	Ariz. Rev. Stat. Ann. Tit. 23, Chap. 8, §§ 23-1301.	None.	Injunctions. Damages.
3. Arkansas	Ark. Stat., Tit. 81, Chap. 2, §§ 81-202—81-204.	Misdemeanor. Fines from $100 to $5,000. Each day is separate offense.	None.
4. Florida	Fla. Stat. Ann. § 12 Fla. Constitution	None.	None.
5. Georgia	Ga. Code Ann. §§ 54-901-903 (1961)	Misdemeanor. Fine up to $1,000 and chain gang up to 6 months, or one year on chain gang. (Tit. 27, § 27-2506.)	Injunctions. Actual damages. Attorneys' fees. Costs.
6. Indiana	Ind. Stat. Ann. §§ 40-2701 to 2706	Misdemeanor. Fine not to exceed $100 and imprisonment not to exceed 10 days.	Actual damages. Attorneys' fees. Costs.
7. Iowa	Iowa Code Ann. § 736A.1 to 736A.8	Misdemeanor. Fine up to $500 and/or imprisonment up to one year. (Tit. 35, §687.7.)	Injunctions.
8. Kansas	Const. of Kans., Art. 15, § 12.	None.	None.
9. Mississippi	Miss. Code Ann. § 6984.5	None.	Actual damages.
10. Nebraska	Neb. Stat. Ann. §§ 48 217-219	Misdemeanor. Fine not less than $100 and not more than $500.	None.
11. Nevada	Nev. Rev. Stat. §§ 613.230-300	None.	Injunctions. Damages.
12. North Carolina	N.C. Gen. Stat. Ann. §§ 95-78 to 84	None.	None.
13. North Dakota	N.D. Cent. Code §§ 34-0144	None.	None.

STATE	STATUTE	PENALTIES	CIVIL REMEDIES
14. South Carolina	S.C. Code Ann. §§ 40-46 to 46.11	Misdemeanor. Fine of not less than $10 nor more than $1,000 and/or imprisonment of not less than 10 nor more than 30 days.	Injunctions. Actual damages. Punitive damages. Attorneys' fees. Costs.
15. South Dakota	S. D. Code §§ 17.1101 and 17.9914.	Misdemeanor. Fine of not more than $300 or imprisonment not to exceed 90 days or both.	None.
16. Tennessee	Tenn. Code Ann. §§ 11412.8 - 13.	Misdemeanor. Fine of not less than $100 and not more than $500 and imprisonment of not more than 12 months. Each day of violation is separate offense.	None.
17. Texas	Tex. Rev. Crim. Stat. Art. 5207A and Art. 7428-1	None.	None.
18. Utah	Utah Code Ann. §§ 34-16-1 to 18	Misdemeanor. Each day of violation is separate offense. Fine up to $300 and/or up to six months imprisonment. (Tit. 76, § 76-1—16.)	Injunctions. "Any and all damages of any character cognizable at common law."
19. Virginia	Va. Code Ann. §§ 40-68 to 40-74.	Misdemeanor. Fine not to exceed $500. Each day of continued violation after conviction is a separate offense.	Injunctions. "Any and all damages of any character cognizable at common law."
20. Wyoming	Adopted Feb. 8, 1963.	Misdemeanor. Fine not to exceed $1,000 and/or imprisonment not to exceed 6 months.	Injunctions. Damages.

In contrast to these divergent state remedies, the single remedy of the Labor Act for the commission of an unfair labor practice is the issuance of an "order requiring such person [who has violated the Act] to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."[4] Section 10(c), 29 U.S.C. § 160(c).

The prosecuting function under the federal Act is entrusted to the N.L.R.B.'s independent General Counsel, who administers a single statute uniformly in all States (3(d), 29 U.S.C. § 153(d)), and no private suits may be brought under the federal Act, *Amazon Cotton Mills Co.* v. *Textile Workers*, 167 F. 2d 183 (4th Cir.). See also, *Clothing Workers* v. *Richman Bros.*, 348 U.S. 511. On the other hand, administration of these "right-to-work" laws is left to hundreds of local prosecutors, who may pursue such enforcement policies as they like, and to individual litigants.

The severity of state remedies suggests that Congress did not intend to permit their application, for they are totally incongruous with the remedial attitude of the federal Act. For example, if an employer of 100 employees in Tennessee forces a single employee to join a union as a condition of employment, the following remedies are available under state law against the employer and probably the union's agents as well: imprisonment up to one year, criminal fines, actual damages, punitive damages, and an injunction. At the same time, such conduct would also constitute a violation of § 8(a)(3) which, under § 10(c) of the federal Act, would be remedied by a cease and desist order. Contrast these severe state remedies for a single coercive

[4] In appropriate cases, the Board also has discretionary power under § 10(j) of the Labor Act to seek temporary injunctive relief against alleged unfair labor practices pending its administrative determination. There are, of course, no criminal penalties under the federal Act.

incident with the maximum remedies provided by the federal Act if this same employer were to discharge each of his 100 employees for joining a union, a flagrant violation of §§ 8(a)(1) and (3). At most in this latter case the N.L.R.B. would order the employer to reinstate these employees with back pay and to cease and desist his illegal conduct. The employer, for this shocking violation of federal law, would not be imprisoned, not be fined, not be sued for actual or punitive damages, and most likely not even enjoined.

State remedies will invariably overshadow the concurrent federal remedy, if the States are free to apply their own remedies. In most "right-to-work" States, an *ex parte* restraining order can be secured against picketing or a strike allegedly in violation of the state statute before the N.L.R.B. can complete the thorough administrative investigation which it, unlike state courts, must perform before passing on the legality of conduct in the first instance. By comparison to the criminal penalties and civil damages provided for by most of these state laws, the federal remedies pale into insignificance. It seems unlikely, therefore, that Congress would have intended to provide state remedies concurrently with federal remedies, where state remedies would be so different qualitatively from federal remedies.

Such state law diversities in principles, penalties, remedies and administration are inconsistent in a fundamental way with the Labor Act's desideratum of eliminating "the causes of certain substantial obstructions to the free flow of commerce . . . ." Section 1, 29 U.S.C. § 151. If parties to labor relations in interstate commerce are to be subject to the remedies of these twenty state laws, they must exercise extreme caution, for the consequences of violating these laws can be very grave. Needless to say, when collective bargaining is conducted in an atmosphere of fear,

timidity and caution, the parties are not likely to engage in experimentation nor to be flexible in their attitudes. Extreme rigidity in labor relations is precisely the result which is likely to be effectuated if the States are free to apply their own remedies as they like.

Perhaps the most compelling reason to deny the States power to apply their own remedies concurrently to conduct which constitutes a federal unfair labor practice is the real danger of conflicting findings on the same facts. This Court long ago warned that Congress did not intend to permit such concurrent regulation, for the reason that a "multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters*, 346 U.S. 485, 490-491.

There is a grave danger of conflicting findings of fact with respect to factually uncomplicated discharges and other kinds of discrimination which would violate both § 8(a)(3) and "right-to-work" laws. The N.L.R.B. could find that an employee had been discharged for just cause, unrelated to his refusal to become a union member, and the N.L.R.B. would dismiss an unfair labor practice complaint. On the other hand, on the identical facts, a state court might find that the discharge was for an illegal object and could send employer and union agents to jail, fine them, grant actual and punitive damages as well as issuing temporary, preliminary and permanent injunctions.

In addition to the inherent danger of conflicting adjudications with respect to the identical facts, there is an even greater danger: It is that state courts might make findings of fact, contrary to facts found by the N.L.R.B., which could result in nullifying protected rights under the federal Act. Suppose that a union calls a strike. An injunction is sought in the state courts on the ground that the strike has an

illegal object of compelling the employer to grant a union shop in violation of the state statute. At the same time, an unfair labor practice charge is filed with the N.L.R.B. alleging that the strike violates §§ 8(b)(2) and (3). If the Board finds—as a matter of fact—that the sole object of the strike is to secure higher wages and that it does not involve union security at all, it follows that the strike is a protected concerted activity under § 7 and is beyond state power altogether. However, while the proceeding is being had before the N.L.R.B., the state court in the meantime finds as a matter of fact that the strike's object is illegal under state law because it seeks to compel the employer to enter into an unlawful contract. How, if at all, could this intolerable conflict be resolved? If the state court has jurisdiction to remedy violations of "right-to-work" laws, this jurisdiction must perforce include the right to make findings of fact as to whether a violation has occurred, which plainly means that the state courts would have power to find facts relating to their own jurisdiction. Even though the N.L.R.B. might make contrary findings of fact, the state court's jurisdiction would still attach by virtue of its own findings of fact. The consequences of such a conflict would permit the States to deprive employees of § 7 rights under the guise of making findings of fact under a state statute. This would work in practice as a kind of reverse preemption doctrine, for on this subject the state courts will almost always find facts to support their jurisdiction. See Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1317.

The issues of fact and law which the state courts would be called upon to make under their "right-to-work" laws, if they have concurrent jurisdiction, are precisely the kinds of issues of fact and law which the N.L.R.B. has regularly been making for years under §§ 8(a)(3) and 8(b)(2). See, e.g., *Radio Officers Union* v. *Labor Board*, 347 U.S. 17. The Labor Board's national point of view, its full-time expertise

qualify it to make such findings. On the other hand, the thousands of county judges who would be called upon to make identical findings under state "right-to-work" laws are more likely to make findings in terms of unrealistic common law standards. They also tend to view legal problems in terms of the social and economic characteristics of the community of which they, usually, are a part. This danger is particularly critical in litigation involving labor relations. *Garner* v. *Teamsters, supra,* 346 U.S. at 490.

Another significant danger of concurrent state remedial jurisdiction is that the state courts will in practice attempt to regulate a myriad of interstate activities over which the States have been ousted of jurisdiction. In other words, we fear that permitting the States to remedy alleged violations of their "right-to-work" laws will serve as an invitation and a temptation to the state courts to regulate all aspects of a controversy which might remotely involve union security. This fear is not academic.

This Court has had three occasions already to reverse state court injunctions against peaceful picketing, issued ostensibly to remedy violations of the "right-to-work" laws of Tennessee, South Dakota, and Georgia. *Electrical Workers* v. *Farnsworth & Chambers,* 353 U.S. 969 (Tennessee); *DeVries* v. *Baumgartner's Elec. Construction Co.,* 359 U.S. 498 (South Dakota); *Local 438, Construction & General Laborers* v. *Curry,* 371 U.S. 542 (Georgia). A great many other state court injunctions against peaceful picketing have also been issued on the basis of "right-to-work" laws. See, e.g., *J. A. Jones Construction Co.* v. *Electrical Workers,* 246 N.C. 481, 98 S.E. 2d 852; *Minor* v. *Building & Construction Trades Council,* 75 N.W. 2d 139 (N.D.); *Olen Department Stores* v. *Retail Clerks,* 39 LRRM 2112 (Miss. Chan. Ct.), which are illustrative only of the *reported* state injunctions against strikes and picketing predicated on alleged violations of "right-to-work" laws.

In many other aspects of labor relations as well, the "right-to-work" state courts have engaged in far-reaching substantive regulation solely by virtue of their jurisdiction to enforce "right-to-work" laws. For example, Louisiana and South Dakota have construed their "right-to-work" laws as prohibiting exclusive bargaining rights, *Piegts* v. *Meat Cutters*, 228 La. 131, 81 So. 2d 835; So. Dakota Attorney General's Opinion, 43 LRRM 73, notwithstanding the fact that § 9 of the federal Act provides that a majority union shall be the "exclusive bargaining representative of all employees in the unit. . . ." A federal court in Arkansas has held that the Arkansas "right-to-work" statute invalidated a collective bargaining contract in its entirety, including a national welfare plan, because of an ostensibly illegal union security clause. *Lewis* v. *Jackson & Squire, Inc.*, 86 F. Supp. 354 (W.D. Ark.), *appeal dismissed* 181 F. 2d 1011 (8th Cir.) *Contra, Lewis* v. *Quality Coal Corp.*, 270 F. 2d 140 (7th Cir.), cert. denied 361 U.S. 929. Alabama has enjoined picketing for the alleged purpose of forcing an employer to bargain about "independent contractors" in violation of that state's "right-to-work" law, *Alabama Highway Express* v. *Local 612, Teamsters*, 108 So. 2d 350 (Ala.), even though the Labor Act entrusts the determination of "employee" or "independent contractor" status to the N.L.R.B. *Labor Board* v. *Hearst Publications*, 322 U.S. 111.

While many other examples might be cited to show how concurrent state court remedial power will inevitably interfere with administration of the Labor Act and implementation of the national labor policy, a recent case is particularly revealing. On December 14, 1961, a Texas court enjoined a union from picketing in support of a demand that an employer enter into an exclusive "hiring hall" contract, the state court reasoning that such a contract demand violated Texas's "right-to-work" law. *Houston Chapter, Associated General Contractors* v. *Hod Carriers, Local 18,*

49 LRRM 2187 (Tex. Dist. Ct.). *A year and a half later,* the N.L.R.B. issued a cease and desist order against this same employer, directing it to bargain in good faith with this same union concerning this same "hiring hall" clause, for the Board said that the state had no power under § 14(b) to prohibit such a clause and that the employer was required to bargain about it at the union's request. *Houston Chapter, Associated General Contractors (Hod Carriers, Local 18),* 143 N.L.R.B. No. 43, 53 L.R.R.M. 1299. Presumably the union is still enjoined from picketing for such a clause in Texas, although the Board has said that the employer must bargain about it. Eventually, of course, this Court might be called on to reverse the Texas courts, but ultimate relief in this Court is years away from the initial entry of a state court injunction.

In order to protect the federal Labor Act from intolerable interference by state courts purportedly acting to remedy violations of their "right-to-work" laws, it is essential that the N.L.R.B.'s remedial power be exclusive.

III. The Legislative History Of § 14(b) Contains No Evidence That Congress Considered and Then Decided To Confer Remedial Jurisdiction On the State Courts For Violations Of "Right-To-Work" Laws.

Congress did not focus on the question of remedies when it enacted § 14(b), for there is no evidence of any Congressional consideration of state remedies. If Congress had any intention of authorizing the States to apply such penalties and remedies as they like on parties to interstate labor relations under § 14(b)—including prison sentences—undoubtedly the Congressional critics of the Taft-Hartley Act would have expressed specific opposition, but the most outspoken critics of Taft-Hartley were as silent on the issue of state remedies as were the proponents of § 14(b). Indeed, there is not a sentence in the entire legislative history of § 14(b) expressing any concern over the deep

conflicts between separate state procedures and remedies to be applied simultaneously with the application of federal remedies under §§ 8(a) and (b), yet surely there would have been serious consideration of these conflicts if Congress had intended to authorize concurrent state remedies.

Although some passages of the legislative history appear to lean one way or another on this question, they do not reveal any true awareness or point of view. The most important factor in the legislative history, we believe, is that it reveals a Congressional desire to permit the States to declare opposition to compulsory membership contracts—nothing more, nothing less. There is not a scintilla of probative evidence that Congress intended to unleash the grave consequences of concurrent state court jurisdiction on labor relations in interstate commerce.

Section 14(b) was written in a Conference Committee. It had no predecessor in the bill which passed the Senate, for the Senate Labor Committee evidently believed that no authorization was necessary to permit the States to prohibit compulsory membership agreements. The Senate report, however, was totally silent on the question of remedies. (Senate Report No. 105 on S. 1126, 1 Leg. Hist. of L.M.R.A. 411-413.)

The House bill, H.R. 3020, however, contained a predecessor to § 14(b). It was § 13 in H.R. 3020, and it provided as follows (1 Leg. Hist. of L.M.R.A. 80-81):

> Sec. 13. Nothing in this Act shall be construed to invalidate any State law or constitutional provision which restricts the right of an employer to make agreements with labor organizations requiring as a condition of employment membership in such labor organization, and all such agreements, insofar as they purport to impose such requirements contrary to the provisions of the law or constitution of any State, are hereby divested of their character as a subject of regulation by Congress under its power to regulate commerce among

> the several States and with foreign nations, to the extent that such agreements shall, in addition to being subject to any applicable preventive provisions of this Act, be subject to the operation and effect of such State laws and constitutional provisions as well.

The meaning of this section is far from clear, for it appears simultaneously to strip union security contracts as a subject of Congressional concern and to make such contracts subject to the "preventive provisions" of both the federal and state laws. It appears, however, to intend at least some kind of concurrent jurisdiction to be exercised by the States, and the main House report—House Report No. 245 on H.R. 3020—speaks of the "concurrent" power granted by the States under this § 13 in several places. House Report No. 245 on H.R. 3020, 1 Leg. Hist. of L.M.R.A. 325, 331 and 335.

The debates in the House reveal very little on this subject, for the critics of § 13 said that union security was a good thing and the proponents said union security was bad. The only exchange which comes near the present issue is this, and it, too, focuses on another problem (1 Leg. Hist. of L.M.R.A. 748):

> MR. BARDEN. It [§ 13] is dealing with a very technical question of regulating commerce between the several States, and in view of the fact that many of the States have passed laws dealing with the closed shop, why, then, the committee felt, and I am sure the whole House will feel, that the States should be recognized and their laws should certainly be given full power and effect as far as a State is concerned.
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> • • •
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> MR. JENNINGS. Does it not in effect mean this, and is it not designed to have this effect, that insofar as this House or the Congress may, it concedes the right of the several States to pass legislation or laws such as have been passed by certain States.

MR. BARDEN. The gentleman is exactly correct.

MR. HOFFMAN. . . . I stated in my opening statement that I understood what the committee was trying to get at, which was to give permission to the States to legislate on interstate commerce insofar as it affected these contracts. But what I want to know is whether this section does it. If you say so, I will have to go along with you.

MR. BARDEN. Well, I say so.

There was no debate on this issue in the Senate until after the Conference Bill was reported.

When the Conference Committee adopted the language of present § 14(b), it necessarily rejected the language of § 13 of H.R. 3020. Why the Conference Committee preferred present § 14(b) to § 13 of H.R. 3020 is nowhere explained explicitly. The changes, however, are evidently significant: (1) The Conference deleted the provision of the House section which would have stripped union security agreements of their character as a subject of Congressional regulation, thereby making clear that it was a subject of Congressional regulation; and (2) The Conference deleted the provision of the House section which would expressly have subjected union security contracts to "the operation and effect of such State laws and constitutional provisions." That these changes were more than stylistic, but were deliberate and substantive, is evident both from the extensiveness of the changes and from a statement by Senator Ball, a Senate conferee, that the language of § 14(b) was the result of a "compromise" (2 Leg. Hist. of L.M.R.A. 1546):

MR. MAGNUSON. How much new matter was put into the bill in conference?

• • •

MR. BALL. I think the question of State contracts was one; that is, making union contracts as a condition

of employment. I think that is new. *There was a compromise in the House on language spelling it out.* (Emphasis added.)

There are several statements in the legislative history that § 14(b) of the conference bill was intended to have the "same effect" as § 13 of H.R. 3020. See House Conference Report No. 510 on H.R. 3020 at p. 60, 1 Leg. Hist. 564; Statement of House Managers on H.R. 3020, 2 Leg. Hist. 1619; and Statement of Senator Taft, 2 Leg. Hist. of LMRA 1543. It might be argued that these statements show that the change of language from § 13 of H.R. 3020 to § 14 of the conference bill was not a change of substance. While § 14(b) has the "same effect" as § 13 of H.R. 3020 in the sense that it too authorizes the States to declare a prohibition against compulsory membership contracts, § 14(b) does not have the same effect in the critical sense here that § 14(b) contains none of the language of § 13 which seemed to authorize state remedial jurisdiction.

Much more important than finding historical clues to the Congressional intention on a specific and technical subject which might not have occurred to Congress is this: What was Congress' dominant object in enacting § 14(b)? The 1947 Congress simply wanted to let the individual States declare whether their citizens could be required to join a union involuntarily, and they wanted to make sure that § 8(a)(3) could not be interpreted to upset this result. In other words, the prevailing mood of the 1947 Congress was to let the States establish the federal policy as to their citizens on the question of compulsory union membership, whether in favor of or against compulsory membership.

Since, as we have explained above, Congress intended to make violation of a "right-to-work" law enacted under § 14(b) a federal unfair labor practice, it is quite natural perhaps that there was no discussion of separate state remedies, for none would have been intended to remedy a

federal unfair labor practice. Congress' silence on the question of remedies seems more probably explained on this basis than on the basis that Congress silently intended to permit the States to fashion any remedies they like to be applied as they like to labor relations in commerce.

Given that Congress wanted to let the States declare the substantive policy for their citizens on the subject of compulsory union membership contracts, where is the evidence to show that Congress intended to authorize concurrent state jurisdiction along with the N.L.R.B., notwithstanding the serious dangers of interference with the national labor policy discussed above? Congress' purpose would be fully and wisely fulfilled by exclusive N.L.R.B. jurisdiction for remedial purposes, absorbing state policy into the federal labor policy whether state policy permits *or* prohibits compulsory membership contracts.

IV. This Court's Decisions Following Algoma Plywood Point To Exclusive Federal Jurisdiction To Remedy All Unfair Labor Practices.

In its direction of reargument, the Court inquired as to the scope and vitality of *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301. In *Algoma* the Court, under the Wagner Act, sustained state court jurisdiction to remedy the discharge of an employee under a "maintenance of membership" contract which violated a Wisconsin statute. The state statute required secret ballot approval by two-thirds of the affected employees as a prerequisite to the execution of such a contract.

Algoma arose under the Wagner Act, but it did not reach judgment until after passage of the Taft-Hartley Act. The Court's exact holding was that § 8(3) of the Wagner Act, 49 Stat. 452, 29 U.S.C. § 158(3), did not deprive the States of power to regulate union security contracts, for that

former section "merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement." *Id.* at 307. Although the Court considered the potential implications of the Taft-Hartley Act, its discussion of § 14(b) appears to be *dicta*.

The Court examined the Taft-Hartley Act to see whether "it expresses a policy inconsistent with . . ." the Wisconsin law which would prevent its enforcement. *Id.* at 313. The Court, concluding that it did not, said, *id.* at 313-314:

> Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union security agreements. Because § 8(3) [sic] of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive.

The two critical questions in this reargument were not considered at all by the Court in *Algoma*: Is execution of a union membership contract in a "right-to-work" state a federal unfair labor practice? If so, is the federal remedy exclusive? Because the employee discharge in *Algoma* occurred *before* enactment of present §§ 7, 8(a)(3), and 14(b), it could not have constituted a federal unfair labor practice under those sections, for violation of a state law was not an unfair labor practice under the Wagner Act. In *Algoma* the question was whether a state may forbid what § 8(3) of the Wagner Act permitted (336 U.S. at 307), whereas here the question is whether a state may remedy a violation of a state law which is also a federal unfair labor practice.

Assuming the correctness of the foregoing analysis, *Algoma* is no barrier whatsoever to the Court's deciding

here that federal remedies are exclusive for violations of "right-to-work" laws which also constitute unfair labor practices. However *Algoma's* scope is interpreted, its vitality has been wholly undermined by the subsequently developed preemption doctrine.

Several years after the Court's *Algoma* decision, and beginning with *Garner* v. *Teamsters*, 346 U.S. 485, the doctrine of federal preemption of interstate labor relations has been developed in a body of strong precedents. The classical expression of the need for the preemption was stated by Justice Jackson in *Garner, id.*, at 490-491:

> A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

The Court summarized the doctrine very succinctly in its next significant preemption precedent, *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 475: "A State may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes."

In the decade following *Garner*, the Court has systematically stricken state court assertions of jurisdiction over conduct arguably subject to the N.L.R.B.'s regulatory power—regardless of the state statute or state policy relied upon to support state jurisdiction.

In three leading and important cases, the Court has reversed state court injunctions based on "right-to-work" statutes where the state courts had found that the object of picketing was to compel violations of state law. *Electrical Workers, Local 429* v. *Farnsworth & Chambers*, 353 U.S. 969; *DeVries* v. *Baumgartner's Elec. Construction Co.*, 359 U.S. 498; *Local 438, Construction & General Laborers* v. *Curry*, 371 U.S. 542. These precedents are apposite here, for in those cases the conduct was arguably subject to regula-

tion by the N.L.R.B., whereas here execution of the contract in question violated employees' § 7 rights under § 8(a)(3) and was subject to regulation by the N.L.R.B.

It seems possible that *sub silentio* the Court decided the present question in *Farnsworth & Chambers*, *DeVries* and *Curry*, *supra*; for the issue at bar lurked in each of them. Those cases cannot be distinguished from this case solely because they involved picketing and this does not. If picketing were the critical distinction in those cases, the result would be this: The States have no jurisdiction to regulate picketing to secure a union security contract, but, if such a contract is actually executed as a result of picketing, the States may regulate the execution in any way they like. Moreover, in the *Curry* case, *supra*, the Court assumed that the state court's finding of an illegal object as a matter of state law was correct, but still found no state court jurisdiction. The preemption doctrine is not limited to picketing cases, but it applies similarly to state efforts to regulate the substantive terms of collective bargaining agreements. *Teamsters, Local 24* v. *Oliver*, 358 U.S. 283.

In addition to these three preemption cases, involving state court reliance on "right-to-work" laws as the basis for attempted regulation of labor relations in commerce, there are many other cases in which a variety of state law grounds—statutory and judicial policy—were asserted as a basis for state court jurisdiction. In each case this Court reversed on preemption grounds.

> *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953, invalidated Wisconsin's regulation based on union security statute—the same statute involved in *Algoma*.
>
> *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, invalidated Wisconsin's regulation based on a statute prohibiting strikes against utilities.

Bldg. Trades Council v. *Kinard Construction Co.*, 346 U.S. 933, invalidated Alabama's regulation based on common law policy to protect employees from being coerced into joining a union by picketing of their employer.

Weber v. *Anheuser-Busch, Inc.*, 348 U.S. 468, invalidated Missouri's regulation based on a restraint of trade statute.

General Drivers v. *American Tobacco Co.*, 348 U.S. 978, invalidated Kentucky's regulation based on statutory and common law policy requiring common carriers and their employees to serve all persons.

Local 25, Teamsters v. *New York, New Haven & Hartford R. Co.*, 350 U.S. 155, invalidated Massachusetts' regulation based on a statute prohibiting secondary boycotts against railroads.

United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, invalidated Louisiana's regulation based on state policy prohibiting picketing by unions which had not complied with the former provisions of the federal Act requiring non-communist affidavits in certain cases.

Guss v. *Utah*, 353 U.S. 1, invalidated Utah's regulation based on labor relations statute where N.L.R.B. had refused to exercise its power over parties.

Meat Cutters, Local 427 v. *Fairlawn Meats*, 353 U.S. 20, invalidated Ohio's regulation based on state common law policy against picketing to coerce an employer to coerce his employees to join a union.

Youngdahl v. *Rainfair, Inc.*, 355 U.S. 131, invalidated Arkansas' regulation based on state policy prohibiting all picketing where any picketing has been violent.

Hotel Employees, Local 255 v. *Sax Enterprises, Inc.*, 358 U.S. 270, invalidated Florida's regulation based on judicial policies against picketing.

Teamsters, Local 24 v. *Oliver*, 358 U.S. 283, invalidated Ohio's regulation based on antitrust statute and policy.

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236, invalidated California's regulation based on common law tort policies.

Plumbers & Steamfitters, Local 298 v. *County of Door*, 359 U.S. 354, invalidated Wisconsin's regulation based on statute prohibiting picketing to coerce employees to join union.

In re Green, 369 U.S. 689, invalidated Ohio's regulation based on common law contempt of court powers.

Marine Engineers v. *Interlake S.S. Co.*, 370 U.S. 173, invalidated regulation based on Minnesota's statute prohibiting minority union picketing for a union shop contract.

Waxman v. *Virginia*, 371 U.S. 4, invalidated Virginia's regulation based on statute prohibiting non-employees from picketing during strike.

Plumbers, Local 100 v. *Borden*, 373 U.S. 690, invalidated Texas' regulation based on common law tort policy.

Iron Workers v. *Perko*, 376 U.S. 701, invalidated Ohio's regulation based on common law tort policy.

Motor Coach Employees v. *Missouri*, 374 U.S. 74, invalidated Missouri's regulation based on statute authorizing seizure of utilities and prohibiting strikes thereafter.

The plain thrust of these cases has been that state regulation of activities in interstate commerce—whatever the alleged jurisdictional predicate—must fall when such activities are subject to the N.L.R.B.'s regulation. The lesson of these cases for the case at bar is self-evident. Since *Algoma* preceded these cases, *Algoma* would not bar preemption of remedies now.

CONCLUSION

For the reasons stated, the N.L.R.B.'s jurisdiction to remedy unfair labor practices in commerce must be exclusive in this case for the same reason that it has been held exclusive in other cases of attempted state regulation, *i.e.*, to avoid intolerable conflicts of policy and procedure. In the absence of a clear Congressional intention to permit the States to apply their divergent remedies to parties in commerce based on the States' own findings of fact, state regulation should fall.

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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August, 1963.